

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN
GREEN BAY DIVISION**

APPLETON PAPERS INC. and
NCR CORPORATION,

Plaintiffs,

No. 08-C-0016-WCG

v.

Judge William C. Griesbach

GEORGE A. WHITING PAPER COMPANY, et
al.

Defendants

DEFENDANT CITY OF GREEN BAY'S PROPOSED FINDINGS OF FACT

Defendant, City of Green Bay, by its attorneys Friebert, Finerty & St. John, S.C. and Allison Swanson, hereby submits the following Statement of Proposed Material Facts in support of the City's Motion for Summary Judgment pursuant to Fed. R. Civ. P. 56 and Civ. L.R. 56.2.

1. In 1962, the United States Congress, under the Rivers and Harbors Act, directed the Army COE to widen and deepen the shipping channel which runs from Green Bay into the lower Fox River (the "Channel Improvement Project"). *See the Rivers and Harbors Act of 1962, PL 87-874.*

2. The Channel Improvement Project required the Army COE to obtain local cooperation prior to any dredging operations. *See Declaration of Edward P. Wiesner, at Ex. B, GB-DP0009385¹.*

3. Brown County, which operates the Green Bay Harbor Commission, agreed to provide local cooperation for the Army COE. *Id.*

¹ Documents attached to the Declaration of Edward Wiesner have been bates labeled. The bates numbers will be used instead of page numbers for ease of reference.

4. One of the requirements of providing local cooperation was that Brown County provide locations for depositing dredge spoils removed during the Army COE operations. *See the Rivers and Harbors Act of 1962, PL 87-874.*

5. In 1966, the City of Green Bay, interested in using the dredge spoils to create developable land, purchased a 585 acre tract of land on the lower west shore of Green Bay, known at the time as the Atkinson Marsh. The land was purchased with the intent to provide a place the Army COE could put the material it removed from the channel during the dredging operation. *Wiesner Decl. at Ex. B, GB-DP0009349, GB-DP0004646, GB-DP0004658.*

6. Working with Brown County, the City of Green Bay began the process of turning the marsh into a confined disposal facility. It constructed a perimeter dike encircling approximately 400 acres of the marsh in order to fully contain the anticipated dredge spoils. *Id. GB-DP0004717, GB-DP0004679.*

7. At all times, the construction of the dike and the operation of the facility was done at the direction of and approved by the Army COE and the State Conservation Department (now the Wisconsin DNR). *Wiesner Decl. at ¶ 6, Wiesner Decl. Ex. B, GB-DP0009339, GB-DP0001356, GB-DP0001781, GB-DP0009377, GB-DP0009387, GB-DP0009637.*

8. Phase I of the Channel Improvement Project began in late 1966. A pilot project initially placed approximately 500,000 cubic yards of dredge spoil into the Bayport CDF. *Wiesner Decl. at ¶ 7, Wiesner Decl. at Ex. B, GB-DP0005261, GB-DP0009361*

9. In 1968, the Army COE requested that it be allowed to deposit dredge spoils in the Bayport CDF for maintenance of the existing shipping channel (the “Channel Maintenance Project”). The City of Green Bay agreed and began accepting dredge spoils from the Channel

Maintenance Project in late 1968. *Wiesner Decl.* at ¶ 8; *Wiesner Decl.* at Ex B at *GB-DP0009413*.

10. The second phase of the Channel Improvement Project began in 1969. *Id.* at *GB-DP0009429*.

11. By 1971, approximately 800,000 cubic yards had been deposited in the Bayport CDF. All dredge spoils had been deposited from the Army COE's Channel Improvement and Channel Maintenance projects. *Id.* at *GB-DP0009438*.

12. Prior to accepting dredge spoils for the second phase of the Channel Improvement Project, the Army COE required the City of Green Bay to pay \$620,000 into an escrow account to reimburse the Army COE for additional costs required to transport dredge spoils from its dredging operations in the shipping channel to the Bayport CDF. *Id.* at *GB-DP0009418-19*, *GB-DP0009432*.

13. While the City of Green Bay knew the dredge spoils would contain some pollutants, the City of Green Bay had no knowledge during the entire Production Period of PCBs in any of the dredge spoils placed in the Bayport CDF. *Wiesner Decl.* at ¶ 11.

14. A review of documents in the City of Green Bay's possession indicates that while the sediments removed from the shipping channel were tested for certain pollutants in 1969, the dredge spoils were first tested for PCBs in 1976. *Id.* at *GP-DP0008638*, *GB-DP0008716-17*, *GB-DP0003444*.

15. Yet even after the presence of PCBs was detected in the dredge spoils, both the Army COE and the Wisconsin DNR approved the use of the Bayport CDF as an acceptable facility for safely containing PCB contaminated dredge spoils. *Id.* See also *GB-DP0009663*.

16. In 1990 and 1992, the Wisconsin Department of Natural Resources tested the Bay Port CDF for PCBs as part of its Mass Balance Groundwater Monitoring Report, wherein it concluded that PCBs “are not emanating from [the Bay Port] site in concentrations which are likely to adversely affect adjacent surface waters.” *Wiesner Decl. at Ex. C, page 13.*

17. In addition, the Bayport CDF is not located within the bounds of the “Fox River Site.” *Wiesner Decl. at ¶ 14.*

18. During the entire period of its operation of the Bayport CDF, the City of Green Bay never engaged in any dredging operations and did not place any dredge spoils in the Bayport CDF. *Wiesner Decl. at ¶ 10.*

19. The City relied on the Army COE to direct and design the operation of the Bayport CDF. *Wiesner Decl. at Ex. B, GB-DP0005990, GB-DP0005301.*

20. During the City of Green Bay’s ownership of the Bay Port CDF, over 3 million cubic yards of dredge spoils have been deposited at the Bayport CDF. *Wiesner Decl. at ¶ 9.*

21. Plaintiffs, Appleton Papers, Inc. and NCR Corporation, have alleged a contribution claim against the City based upon alleged releases of PCBs from the Bayport Confined Disposal Facility (the “Bayport CDF”). *See Declaration of M. Andrew Skwierawski at Ex. A, Resp. to Interrogatory No. 1; Skwierawski Decl. at Ex. B, Resp. to Interrogatory No. 1.*

22. Plaintiffs have been unable to support an allegation that there have been any material releases of PCBs from the Bayport CDF. *Skwierawski Decl. at ¶¶ 2-5, Exs. A,B, and C.*

23. Plaintiffs have no evidence that PCBs released from the Bayport CDF migrated to the Fox River Site. *Id.*

Respectfully submitted this 2nd day of April, 2010.

/s/ M. Andrew Skwierawski

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